IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3219 OF 2004

M/s.Swan Mills Ltd.)

T.J. Road, Sewree,Mumbai-400 015)..PETITIONER

Versus

1.Shri Arun Motiram Kale)

2-6, Urankarwadi, Girgaon,)

Mumbai-400 004.)

2.V.E.Potdar, Presiding Officer)

5th Labour Court, Mumbai,)

Ground Floor, New Administrative)

Building, Opp.Chetna College)

Bandra (East), Mumbai400 051.)

3.P.B. Sawant, Member,Industrial)

Court, Mumbai, 1st Floor,)

New Administrative Building,)

Opp.Chetna College, Bandra)

(East), Mumbai-400 051.)..RESPONDENTS

Mr. V.P.Vaidya for the Petitioner

Mr. Irfan Engineer for the Respondent No.1.

CORAM: F.I. REBELLO J.

DATE : 16th December, 2004

P.C.:

. Rule. Heard forthwith.

2. The Respondent No.1 herein had filed an application under the provisions of the Bombay Industrial Relations Act which was numbered as Application (BIR) No.147 of 1992. It was the case of the Respondent No.1 that in April, 1974, he was appointed to the Engineering Department of the Petitioner Company. He was made permanent in 1978. The petitioner, it was averred, is a Process House having two other Units, one at Sewree and another at Kurla. Both were spinning and Weaving units. There are about 3000 workers employed with the petitioner. The respondent No.1's contention was that the Company was illegally closed on and from 27th January, 1988. The matter was referred to Board for Industrial & Financial Reconstruction, for a declaration that it be wound up. The workers had formed a Co-operative Society and submitted a scheme for taking over the three mills. It is their case that a promoter was then put forward by the owner of the petitioners to submit a scheme for revival of the 3 units. The scheme was accepted under certain conditions. Before B.I.F.R. it was submitted that the 3 units would reopen and commence production with the old workforce and the workers will be taken back according to their seniority. A complaint was also filed by the workers against the illegal lockout for

the period from 27th January, 1989 till 1st April, 1991 which is pending before the Industrial Court. The Company was reopened on 1st April, 1991. Though the respondent No.1 reported for work, he was not taken on duty. Juniors to him have been taken back on duty and even one helper has been promoted to the post of fitter and he is doing similar work as that of the respondent No.1 in the Engineering Department of the petitioner. Though he was regularly reporting for work, no work has yet been given to him. He was being regularly assured that work would be given soon and that he must wait for some more time. As no communication was received by him from the petitioners to report for work, he had no option but to report for work daily on his own. In fact he met one Acharya and Mr. Nandalal on several occasions. No notice of retrenchment or lay-off has been served upon the respondent No.1 nor has any termination letter been issued to him. Inspite of various attempts as the respondent No.1 was not given work by approach letter dated 7th August, 1992 he demanded reinstatement with full back wages. As there was wrong mention of date by letter of 26th August, 1992 the same was corrected.

3. Counsel for the Petitioner who is present states that the reply filed to the application for interim relief was adopted as the written statement. The petitioner denied that the respondent had reported for duties on 1st April, 1991. It is set out that B.I.F.R. had declared the petitioner company to be sick unit. An attempt by the Co-operative Society to

take over the mill was rejected by B.I.F.R. and it was the new promoters who were allowed to carry on the activities. It is set out that the new promoters of the petitioners laid down certain terms and conditions. One of the specific terms laid down was that the reliefs and concessions as put forth in the Rehabilitation Scheme be sanctioned. In so far as labour is concerned it provided for retrenchment of the labour force and wage freeze. It is set out that the prayer sought by the respondent is contrary to the intentions as agreed upon by the parties in the Memorandum of Understanding which has been accorded sanction and approval as being part of the Rehabilitation scheme by the B.I.F.R. Any interference in the scheme will be interfering in the rights and privileges of the B.I.F.R. It is set out that if the relief as prayed for are granted it will defeat the purpose for which the B.I.F.R. has been created and the intentions of the Legislatures to revive such sick units.Various contentions have been raised as to why the present management of the petitioners cannot be held liable. Reference is then made to the M.O.U. signed by the previous owners, the new promoters and the representative Union. In terms of the MoU all Sections except the Spinning and Weaving Department were to be closed down. As per the MoU the Process House was to be closed. The new promoters in the month of December, 1991 on their own thought it fit and proper to start the activities of the Process House in a small manner. Before that BIFR had, by its order dated 20th February, 1992 accepted the Rehabilitation Scheme which included Memorandum of Understanding dated 5th February, 1991.

It is then stated that it is not correct to say that there is work existing for all the employees and that the employees junior to the Respondent No.1 in his category are carrying out the work in the Process House. The meeting as averred by the respondent with Mr. Acharya and Nandlal was denied or that the respondent was informed that seniority list would be displayed on the Mill's Gate as alleged.

4. The respondent No.1 examined himself and was cross examined on behalf of the petitioner herein. He has averred that he was reporting for duty and when he had enquired with the management he was informed that the workers will be taken back and inspite of that the mill started process house and no letter was issued to the Respondent. It is further stated that when he reported for duty he found that the juniors are working in the process house. The contents of the approach letters dated 7th August, 1992 and 26th August, 1992 were correct. He has named the employees junior to him. He admitted that prior to 27th January, 1989 there were about 68 workers working in Mechanical Section of Engineering Department. He stated that he is not aware as to whether at present there are 37 workers nor was he aware as to whether it was decided between the Union and the management the number of complements and that it is fixed by the settlement. It appears that no evidence was led on behalf of the petitioners.

. By the order dated 5th August, 1996 the application of the respondent No.1 was allowed. Various issues had came to

be framed. The learned Labour Court held that the opponent mill was closed with effect from 27th January, 1989 and was referred to B.I.F.R. and was declared as sick. The scheme forwarded by the promoter was accepted by the B.I.F.R. under certain conditions and the Company was reopened with effect from 1st April, 1991. The Court held that the Applicant had not received any letter of termination nor had been served with any show cause notice or charge sheet. The Company was thereafter not under B.I.F.R. The learned Judge noted that the limited issue was whether the action of the petitioner in not taking Respondent No.1 back according to his seniority amounted to retrenchment. The learned Judge noted the evidence of the witness that juniors to the Respodnent No.1 were taken back and the names of those juniors have been cited.

. The Court considering the rival contentions held that the seniority list and the position of the workers working in the process house is on record and it manifestly demonstrate that the juniors to the applicant were taken back on work, though pursuant to the agreement between the management and the R.M.M.S. The Court held that it was obligatory on the part of the petitioners to give employment to the respondent in the petitioner mill with effect from 1st April, 1991 and as that has not been happened was pleased to direct the petitioners to reinstate the respondent No.1 in service in his original post with back wages with effect from 1st April, 1991. The contention urged on behalf of the petitioner that

the application was barred by limitation was rejected.

5. The petitioner aggrieved preferred an Appeal. That appeal came to be rejected by order dated 17th July, 1993. The Appellate Court also framed points for determination though they are set out as issues. The learned Appellate Court considered the MOS in order to ascertain whether even after revival by B.I.F.R. whether the management had called on the respondent No.1 to resume duties or had given any of his legal dues as agreed in the settlement. It is set out that it was revealed that the Engineering Department was working and as the respondent was working in the Engineering Department, it was quite natural that an employee would like to wait for his call or to get his employment or get his legal dues. Adverting to the judgment of the Labour Court the learned Appellate Court found that the Labour Court addressed itself to the correct issues. The contentions as raised were examined on the evidence on record and were rejected. The learned Appellate Court noted that the trial Court had recorded a finding of fact that the services of the petitioner were terminated without following due process of law. The Appellate Court further noted that the said finding does not require any interference. Various authorities relied upon were adverted to. The learned Appellate Court then set out that even if all the employees in terms of MoU are not reemployed there must be some reason for denying an opportunity to the Respondent No.1 The learned Appellate Court set out that the incapability and or incapacity ought to have

been disclosed by the employer before refusing to employ the respondent No.1. No substantive reason was forthcoming for denying such opportunity. The issue of delay was also considered and the objections raised by the petitioners were rejected. Adverting to the agreement between the petitioner and the Union the learned Appellate Court held that the Petitioner could not have denied employment to the respondent No.1 without assigning any reason or without ascertaining the availability of the respondent No.1 though he approached the employer daily and even though he had submitted an approach letter, he was not taken in employment and accordingly dismissed the Appeal.

6. At the hearing of this petition on behalf of the petitioners their learned Counsel draws my attention to the settlement with the Union and more so to the Engineering Department where strength of the workers were reduced from 68 to 37. It is, therefore, submitted that the petitioners in order to make the Company viable had no choice but to reduce the workers and that they had complied with the settlement and given jobs to those who were available. The settlement itself, it is set out, contemplated that all persons should not be given employment and in these circumstances the action of the petitioners cannot be faulted.

7. The real question to be answered is whether the petitioners even if there was a settlement with the Union could pick and choose amongst those who had to be considered

to be given employment. The settlement does not provide for the manner in which the employees were to be selected. The case of the petitioners throughout has been that even before B.I.F.R. it was agreed that the employees would be given jobs based on their seniority. Even if that not be the case and considering that some of the workers were not to be reemployed and consequently retrenched or terminated the petitioners had to adopt a rational policy without giving go-bye to the known principles under the Industrial Law. The known principle is first come last go unless the employee makes out a case of unsuitability or otherwise. The respondent No.1 employee had brought on record and also in his oral evidence that juniors to him had been taken in employment. He had given an approach letter. His oral evidence was not rebutted by any evidence on the part of the petitioners herein. In the light of that the finding of the Courts below that juniors to the respondent employee were given job cannot be faulted. Even otherwise the respondent No.1 employee was not cross examined on that aspect of the matter. Once that be the case, it must clearly be held that there was a finding in favour of the respondent No.1 workman that juniors to him had been retained in service or have been offered employment by by-passing him. The petitioner company has given no explanation for the same. In my opinion the retrenchment is contrary to the well known principles including Section 25(F) of the I.D. Act. If that be so, the impugned orders of the Courts below do not suffer from any error apparent on the face of the Record nor are the findings are perverse to warrant interference by this Court.

8. For the aforesaid reasons I do not find this to be a fit case for this Court to exercise its extra ordinary jurisdiction considering the findings by the Courts below. Petition rejected. Rule discharged. There shall be no order as to costs.

Certified copy expedited.

(F.I.REBELLO, J.)